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Supreme Court, U.S.
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No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1986.

PATRICK COLE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

I. Whether public policy dictates that the actions of the chief government agent in (A) initiating a sexual relationship with petitioner's live-in fiancée to gather information against the petitioner, (B) deliberately and intentionally failing to inform the issuing judge of his access to petitioner's fiancée and interior of petitioner's residence as investigative means alternative to issuance of a wiretap, and (C) deliberately and intentionally interferring with petitioner's Sixth Amendment right to counsel after indictment, collectively served to deprive petitioner of due process.

II. Whether the intentional omission of government agent's ready access to petitioner's fiancée and interior of petitioner's residence as investigative means alternative to a wiretap violated 18 U.S.C. § 2518(1) (c), thus mandating suppression of the evidence?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Counsel for Patrick Cole, on his behalf, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Opinion Below.

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-13a) is reported at 807 F.2d 262. The district court entered a written denial of petitioner's motion to dismiss (App. C, pp. 15a-17a) which is unpublished.

Jurisdiction.

The judgment of the Court of Appeals (App. B, *infra*, p. 14a) was entered on December 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statement of the Case.

On October 9, 1985, a grand jury returned a multiple count indictment charging the petitioner with conspiracy to possess and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1) and § 846 and three counts of unlawful use of a telephone to facilitate the commission of a drug conspiracy, in violation of 21 U.S.C. § 843(b).[1]

Federal jurisdiction in the court of the first instance, the Federal District Court for the District of Massachusetts, was based on violations of federal criminal statutes herein listed.

The petitioner filed a motion to dismiss the indictment and two motions to suppress evidence, all of which were denied. The petitioner subsequently entered a conditional plea of guilty to the charges against him preserving his right to appeal the adverse determination of the motions.

The chief government officer in the case against the petitioner was Charles Bradley, a detective attached to the Northboro, Massachusetts Police Department. Detective Bradley was involved in an investigation of the petitioner in conjunction with the Drug Enforcement Administration. The investigation commenced in January, 1985.

During the course of the investigation, mid-April, 1985, Detective Bradley initiated a personal meeting between him-

[1] There were three other co-defendants, only one of whom, Joan Adamson, is relevant to this petition.

self and the petitioner's live-in fiancée, Joan Adamson. He informed his superiors and fellow officers that he intended to try to cultivate Adamson to obtain information about the petitioner. The trial judge determined that Bradley was prepared to engage in sexual intercourse as a means of obtaining information to further the ends of law enforcement.

Early in May, 1985, the relationship between Detective Bradley and petitioner's fiancée became sexual. Bradley monitored petitioner's absence from his home and sexual liaison between himself and Joan Adamson would take place while petitioner was away.

Bradley estimated that he was in petitioner's residence from twelve to fifteen times, during which he had ample opportunity to make extensive observations of petitioner's sophisticated security system consisting of surveillance cameras, T.V. video monitors and a sequential relay board, as well as the rest of the interior of petitioner's home. He also engaged Adamson in repeated conversations concerning petitioner, the results of which the trial judge concluded were fruitless.

In August, 1985, DEA Special Agent Kathleen Bennett, with whom Bradley had been working, began preparing an affidavit for a Title III wiretap on petitioner's telephone. Bradley did not inform Bennett of either his relationship with Adamson or his ready access to petitioner's home. Thus, this information was not included in the Bennett affidavit as possible alternative investigative means, contrary to the mandate of 18 U.S.C. § 2518(1)(c).

An authorization for a pen register on petitioner's telephone issued August 19, 1985. The wiretap authorization issued September 9, 1985. Bradley temporarily halted his relationship with Adamson during the time in which the telephone was monitored, lest his actions be discovered by his colleagues.

On September 24, 1985, Agent Bennett obtained a search warrant for petitioner's residence based upon information

derived through the wiretap. Execution of the warrant resulted in the seizure of evidence which formed the basis for the indictments against petitioner and Adamson.

Subsequent to the indictment against her and the termination of the wiretap, Bradley renewed his affair with Adamson. The trial judge concluded that by using Adamson as his pawn, Bradley deliberately and intentionally interfered with petitioner's Sixth Amendment right to counsel. However, the judge determined that insufficient prejudice was demonstrated to warrant dismissal of the indictment. The indictment against Adamson was dismissed when the government was made aware of the conduct of Detective Bradley.

The Court of Appeals affirmed the judgment of the District Court in denying petitioner's motion to dismiss and two motions to suppress (App. A, *infra*, 1a-12a).

Reasons for Granting the Petition.

I. In *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973) this Court acknowledged that someday a situation might arise "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." The plurality opinion in *Hampton* v. *United States*, 425 U.S. 484 (1976), likewise suggests that fundamental fairness might, in extreme circumstances, require dismissal of a prosecution because of outrageous police conduct.

Detective Bradley initiated a sexual relationship with petitioner's fiancée, through which he gained unrestrained access to the confines of petitioner's home. He informed no one of his actions and temporarily ceased his affair when a wiretap of petitioner's telephone threatened to expose him. Bradley

testified as to his knowledge of the provisions of 18 U.S.C. § 2518(1)(c), which require that a wiretap application detail what alternative investigative means have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried. Nonetheless, he intentionally declined to inform anyone of his easy access to Joan Adamson and petitioner's residence.

Additionally, once the indictments were returned, Bradley renewed his affair with Adamson despite the fact that she was also indicted. He embarked upon a deliberate and intentional course of action which the trial judge determined was designed to interfere not only with Adamson's but petitioner's Sixth Amendment right to counsel. However, the trial court, with whom the Court of Appeals concurred, determined that there was an insufficient showing of prejudice.

Petitioner submits that justice mandates that police misconduct no longer be reduced to simple "nice calculations as to the amount of prejudice arising . . ." from such impropriety. *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). It is time that this Court acknowledge that there are indeed instances where "police conduct . . . falls below standards, to which common feelings respond, for the proper use of governmental power," *Sherman* v. *United States*, 356 U.S. 369, 382 (1958), and that due process principles dictate dismissal with prejudice.

Detective Bradley initiated a sexual relationship with petitioner's fiancée for investigatory purposes, gained frequent access to petitioner's residence for sexual rendezvous and surveillance, intentionally declined to inform anyone of his actions despite acknowledging his affirmative duty under 18 U.S.C. § 2518(1)(c) to do so, and embarked upon a post indictment course of action designed to interfere with petitioner's constitutional rights. This was not one isolated occasion of misjudgment. Rather, this was a chain of egregious behavior characterized by one central theme: blatant disregard for constitutional, statutory and moral law. In short, conduct which "shocks the conscience."

Rochin v. *People of California,* 342 U.S. 165, 172 (1952). In fact, Detective Bradley's actions were "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States* v. *Ryan,* 548 F.2d 782, 789 (9th Cir. 1976).

No longer should police be shielded by the knowledge that courts will engage in the frail niceties which surround prejudicial calculations. "Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced." *Commonwealth* v. *Manning,* 373 Mass. 438, 444, 367 N.E.2d 635 (1977). The only means of discouraging such egregious behavior in future cases is to dismiss the indictments with prejudice.

II. 18 U.S.C. § 2518(1)(c) provides that an applicant seeking judicial authorization for a wiretap must provide "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Such language is reflective of legislative concern for the considerable compromise on privacy which is imposed upon individuals targeted by wiretaps. Wiretaps should not be utilized where other viable and less intrusive investigative means exist. *United States* v. *Kahn,* 415 U.S. 143, 153 n.12 (1974); *United States* v. *Giordano,* 416 U.S. 505, 515 (1974).

In *United States* v. *Robinson,* 698 F.2d 448, 453 (D.C. Cir. 1983), the Court of Appeals for the D.C. Circuit eloquently cautioned that courts "must be careful not to permit the government merely to characterize a case as a 'drug conspiracy' . . . that is therefore inherently difficult to investigate. The affidavit must show with specificity why in *this particular investigation* ordinary means of investigation will fail." (Emphasis in original.)

The Court of Appeals addressed only the possibility of using Joan Adamson as an alternative investigative source. The court

concurred with the trial judge in determining that she was not a viable source of information. However, the denial of the motion to suppress runs afoul of the legislative intent behind 18 U.S.C. § 2518(1)(c). It is uncontradicted that Detective Bradley was not only in frequent contact with petitioner's live-in fiancée but had ready access to the interior of petitioner's residence. Logic suggests that this situation was a very viable alternative to the intrusive wiretap. This theory is underscored by the fact that it was petitioner's residence that was the target of the search warrant and the location of various items of evidence supporting the indictments.

The only reason Detective Bradley stopped entering petitioner's residence was because once the wiretap commenced, he feared that his illicit activities would be uncovered. Had the wiretap not been installed, Bradley could have continued to enter petitioner's residence with the consent of Adamson, and would have been afforded a first hand opportunity to view the precise premises where the evidence was eventually seized pursuant to the search warrant. It would appear that such investigative means is precisely the alternative of which 18 U.S.C. § 2518(1)(c) anticipates.

Conclusion.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A.

United States Court of Appeals

For the First Circuit

No. 86-1183

UNITED STATES OF AMERICA,
APPELLEE,

v.

PATRICK COLE,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, *U.S. District Judge]*

Before
Campbell, *Chief Judge,*
Bownes and Torruella, *Circuit Judges.*

Robert J. Wheeler with whom *John C. McBride* and *Francis T. O'Brien, Jr.* were on brief for appellant.

S. Theodore Merritt, Assistant United States Attorney, with whom *William F. Weld,* United States Attorney, was on brief for appellee.

December 11, 1986

BOWNES, *Circuit Judge*. In this rather bizarre case, defendant-appellant Patrick Cole appeals a denial of his motion to dismiss the indictment and motions to suppress the fruits of wiretap evidence and evidence seized from his home. Cole was charged in a multiple count indictment with conspiracy to possess and possession of cocaine with intent to distribute it in violation of 21 U.S.C. § 841(a) (1) and § 846. The indictment also charged Cole with three counts of the unlawful use of a telephone to facilitate the commission of a drug conspiracy in violation of 21 U.S.C. § 843(b). The indictment was based primarly on information obtained from a duly authorized wiretap of Cole's telephone. There were three other codefendants, only one of whom, Joan Adamson, figures in this appeal.

The basis for the motions to dismiss the indictment and suppress evidence was that one of the investigating officers, Detective Charles Bradley, had engaged in a romantic affair with codefendant Joan Adamson, Cole's live-in companion, both before and after the indictment. Both Bradley and Adamson admitted that they became romantically entangled during the preindictment investigation of defendant and that their affair continued after defendant and Adamson were indicted. After the extent of the affair became known to the prosecutor, the charges against Adamson were dropped.

The district court held a *Franks* v. *Delaware*[1] hearing to determine whether the failure to disclose the affair between Detective Bradley and Adamson in the wiretap application vitiated the wiretap. It found that it did not. After the district court denied defendant's pretrial motions, he entered a plea of guilty conditioned on his right to appeal the adverse rulings.

The issues before us are whether the affair deprived defendant of due process, interfered with his right to counsel, vitiated the need for a wiretap on defendant's phone and poisoned all

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[1] 438 U.S. 154 (1978).

the fruits evidence [*sic*] resulting from the wiretap. Defendant also claims that the court erred in limiting the cross-examination of Bradley on the length of the affair.

I. THE FACTS

Sometime in 1982 or 1983, the Northboro Massachusetts Police Department began to suspect that defendant was a drug dealer. On April 6, 1984, Detective Bradley executed a search warrant on defendant's residence in Northboro. As a result, charges of illegal possession of weapons and cocaine were filed against defendant in the Westboro District Court. Defendant, who had been a part-time police officer on the Northboro Police Department in 1976, was given a two-year suspended sentence in return for his promise to cooperate with Bradley on other drug investigations. Defendant himself continued to be under investigation. In January, 1985, an investigation into cocaine trafficking by defendant was commenced by the Drug Enforcement Administration (DEA) in conjunction with police officers in the Northboro area, including Detective Bradley.

As part of the investigation, Bradley telephoned defendant at Patrick's Body Shop. Defendant's residence, which he shared with Adamson, was located over the Body Shop. When defendant was not at home, Bradley talked to Adamson who took messages for defendant. Bradley and Adamson became telephone acquaintances. In the middle of April, 1985, Bradley asked Adamson to meet him in person, partially because he had enjoyed talking to her on the phone and also because he hoped that she would be a source of information about defendant's drug dealing activities. Bradley informed his superior and fellow officers that he was going to try to cultivate Adamson to obtain information about defendant. Adamson knew Bradley was a detective investigating defendant. She told him

repeatedly that she did not know anything about drug activities by the defendant and that she would not cooperate in the investigation of defendant.

Early in May, 1985, the relationship between Bradley and Adamson culminated in sexual relations. Thereafter, sexual liasons took place from time to time in defendant's home when defendant was away. Bradley extimated that he was in defendant's residence from twelve to fifteen times. While there, he had an opportunity to observe defendant's sophisticated security system which consisted of surveillance cameras, TV video monitors and a sequential relay board. Bradley testified that he never saw any drugs or drug related materials at defendant's home.

As the affair continued, Bradley and Adamson expressed their love for each other. This did not deter Bradley from inquiring about defendant's drug activities, nor did it change Adamson's insistence that she knew nothing about such activities and would not help Bradley in his investigation. Both stuck to their principles.

In the beginning of August, 1985, DEA Special Agent Kathleen Bennett, with whom Bradley had been working, began preparing an affidavit for a Title III wiretap on defendant's phone. Bradley then stopped seeing or contacting Adamson. He did not tell Agent Bennett of his affair with Adamson and it was, therefore, not included in the wiretap application. An application for an order authorizing a pen register on defendant's telephone was made and granted on August 19, 1985. On September 9, an application was made for an order authorizing a wiretap on defendant's phone; it was granted the same day. Agent Bennett's wiretap applications included a great deal of information supplied by Bradley.

On September 24, Agent Bennett submitted an application for a search warrant of defendant's residence. The information in the affidavit came from the phone wiretap. The warrant was

issued and a seizure of cocaine, scales and other cocaine paraphernalia were seized. Defendant and Adamson were arrested after the execution of the search warrant.

Bradley and Adamson renewed their affair after her arrest and she subsequently became pregnant. Bradley was married throughout this period.

II. THE MOTION TO DISMISS THE INDICTMENT

A. *Due Process*

The basis of defendant's claim that he was deprived of due process is that Bradley's affair with Adamson was so egregiously improper that it should bar prosecution. He relies on statements, mainly dicta, culled from Supreme Court cases.

The first case on which defendant relies is *United States* v. *Russell*, 411 U.S. 423 (1973). Russell was convicted of manufacturing an illegal substance. He claimed entrapment because a DEA agent supplied him with one of the ingredients. The Court affirmed, finding that since Russell was predisposed to manufacture the drug, there was no entrapment. The language on which defendant relies is:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California*, 342 U.S. 165 (1952), the instant case is distinctly not of that breed.

Id. at 431-32. Nor is this case of such a breed. Likewise, we find no help for the defendant in Justice Frankfurter's concur-

rence in *Sherman* v. *United States*, 356 U.S. 369, 378-85 (1958), which is a careful analysis of the basis of the entrapment defense. The instant case simply is not an entrapment case. Defendant equates Bradley's conduct with that of the police in *Rochin* v. *California*, 342 U.S. 165 (1952), which the Court found "shocks the conscience." *Id.* at 172. The police in *Rochin* broke into defendant's home without a warrant, assaulted him, and then took him to a hospital and had his stomach pumped out against his will. Bradley's affair with Adamson cannot be equated with such conduct.[2]

We find no grounds for a due process violation of defendant's rights in the affair between Bradley and Adamson. We agree with the district court that there is a real question as to who seduced whom. Indeed, if we take the parties at their words, there was no deliberate seduction by either one; Bradley and Adamson fell in love with each other and entered into sexual relations. This is not an uncommon occurrence in this age or any other. While we do not condone the conduct of Detective Bradley, there was nothing done by him that deprived defendant of due process of law.

B. *Interference with Defendant's Right to Counsel*

The second reason advanced by defendant for dismissing the indictment is that Bradley interfered with defendant's right to counsel. Following the indictment of defendant and Adamson and the imprisonment of defendant, Bradley and Adamson renewed their affair. During this time, Bradley disparaged the

[2] Defendant cited a Florida case, *State* v. *Eichel*, No. 85-304, Fla. Ct. App., 2d Dist. (March 12, 1986), in which the court upheld the dismissal of an indictment on the grounds that obtaining evidence by the use of sex was improper police conduct and "beneath the dignity of the state." This opinion was reversed en banc, however, in a decision dated September 17, 1986, and the case remanded for a jury determination of whether there had been entrapment under Florida law.

attorneys who were representing defendant and Adamson. The district court stated:

> Based on the affidavits and motion papers before it, this Court is prepared to infer that Detective Bradley, during the period following the indictments of Adamson and Cole, intentionally pursued a course of action designed to interfere with those defendants' Sixth Amendment right to counsel and that such conduct is fully binding on the United States.

The court, however, found that there was no demonstrable prejudice to defendant. We agree.

Bradley's disparaging remarks had no effect on defendant, assuming that they were relayed to him. Because defendant and Adamson were represented by attorneys who were partners in the same law firm, the district court held a hearing pursuant to Federal Rule of Criminal Procedure 44(c).[3] The court fully and meticulously explained to both defendant and Adamson the risks involved in being represented by members of the same law firm. By the time of the hearing, the defendant must have been aware that Adamson's affections were at least shared

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[3] Federal Rule of Criminal Procedure 44(c) provides:

> (c) **Joint Representation.** Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

with Bradley. Defendant chose to keep the attorney whom he had retained originally. And that attorney has capably represented defendant through this appeal. We affirm the district court's finding that Bradley's disparagement of defendant's counsel to Adamson did not result in prejudice to defendant.

The next question is whether, in light of the district court's finding that Bradley "intentionally pursued a course of conduct designed to interfere with [defendant's] Sixth Amendment right to counsel," the indictment should have been dismissed as a matter of law for prophylactic purposes. The Supreme Court teaching prohibits a dismissal on purely prophylactic grounds.

In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), an undercover agent, unknown as such to defendant and his attorney, attended a meeting between defendant and his attorney. The agent did not attempt to obtain any information for the prosecutor, nor did he relay any informaton to the prosecutor. The Court of Appeals for the Fourth Circuit held that attending the meeting amounted to a *per se* violation of defendant's right to effective assistance of counsel and a fair trial. The Supreme Court rejected this "prophylaxis" approach and found that because there was "no tain[t]ed evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment . . . ." *Id.* at 558.

An even stronger case is *United States* v. *Morrison*, 449 U.S. 361 (1981). In *Morrison*, federal agents, fully aware that defendant had been indicted on drug charges and had retained ccounsel, met with her without her attorney's knowledge. The purpose of the meeting was to seek her cooperation in a related investigation. The government agents disparaged defendant's counsel and told her that she would gain various benefits if she cooperated, but faced a stiff jail term if she failed to cooperate. Defendant refused the agents' overtures and notified her attorney of what had transpired. The agents visited defend-

ant again in the absence of counsel. "At no time did respondent agree to cooperate with them, incriminate herself, or supply any information pertinent to her case. Contrary to the agents' advice, respondent continued to rely upon the services of the attorney whom she retained." *Id.* at 362-63. The district court denied defendant's motion to dismiss the indictment. As here, there was a conditional plea of guilty while defendant appealed. The Third Circuit held that, whether or not defendant had been prejudiced, her sixth amendment right to counsel had been violated and dismissed the indictment with prejudice. The Supreme Court, in a unanimous opinion, reversed. It held, "absent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even through the violation may have been deliberate." *Id.* at 365 (footnote omitted).

Since there was no demonstrable prejudice here, there is no ground for dismissing the indictment.

III. THE WIRETAP APPLICATION

The wiretap application made no mention at all of the Bradley-Adamson affair. Defendant argues that this omission, particularly that Bradley was in defendant's home twelve to fifteen times when defendant was away, violated two subsections of 18 U.S.C. § 2518: (1) (c) and (3) (c). Section 2518, which establishes the procedure for interception of wire or oral communications, requires that a wiretap application include, *inter alia*, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous[.]" § 2518 (1) (c). The statute further provides that a judge may issue an ex parte order for a wiretap if he determines on the basis of the facts submitted that, *inter*

alia, "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous[.]" § 2518 (3) (c). It is defendant's position that if the clandestine visits of Bradley to defendant's home had been included in the wiretap application the strictures of § 2518 (1) (c) and 3(c) would have prevented the wiretap order from being issued.

There can be no question "[j]udicial wiretap orders must be preceded by applications containing prescribed information, § 2518(1). The judge must make certain findings before authorizing interceptions, including the existence of probable cause, § 2518(3)." *United States* v. *Giordano*, 416 U.S. 505, 514 (1974). This is because wiretaps should be used only if necessary. Necessity, however, does not mean that the government must exhaust all other investigative procedures before resorting to a wiretap. The requirements of § 2518(1) (c) and (3) (c) are "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153 n.12 (1974); *United States* v. *Santarpio*, 560 F.2d 448, 452 (1st Cir.), *cert. denied*, 434 U.S. 984 (1977); *United States* v. *Scibelli*, 549 F.2d 222, 226-27 (1st Cir.), *cert. denied*, 431 U.S. 960 (1977).

The district court, fully aware of the problem raised by the omission in the application, held a hearing pursuant to the requirements of *Franks* v. *Delaware*, 438 U.S. 154 (1978), to determine whether the omission was material and, if it were, would the order still have issued. It found that, although the information withheld was "not insubstantial," it was not material. The court's findings on materiality deserve quoting:

> Materiality means if the statements had been made and what we know today after two days of hearing, had been in the affidavit, would the warrant neces-

> sarily, nevertheless, have issued. If it would have issued even though we knew these things, the information is immaterial. If this Court would not have issued the warrant had it known of Bradley's romantic involvement with Adamson and all the circumstances that we now know, then it is material and the wiretaps and all information deriving therefrom must be suppressed. The Court rules it's not material. It's not material because the Court finds that from all the circumstances that Ms. Adamson was not, given the nature of the conspiracy here, the use of the telephones, the surreptitous delivery and apparent movement of the cocaine, she was not the means for breaking open the conspiracy. On at least one occasion she evidenced her unwillingness, out of a fear of retaliation, to make statements inculpatory of Cole. Therefore, the Court rules that even had it known all the information that it now has, the standards set forth by Title 19, Section 2518 1 (c) would have been met and the warrant would have issued.

The court went on to point out that the application "detailed in an appropriate and careful manner . . . all those reasons why an appropriate way to investigate this conspiracy was through wiretaps."

This circuit's standard of review of wiretap application is well defined:

> "It is not our province to engage in *de novo* review of an application; instead, we 'test it in a practical and comonsense manner' to determine whether the facts which it sets forth are 'minimally adequate' to

> support the findings made by the issuing judge.' *United States* v. *Smith*, 726 F.2d 852, 864 (1st Cir. 1984), citing and quoting *United States* v. *Southard*, 700 F.2d 1 (1st Cir. 1983), and *United States* v. *Scibelli*, 549 F.2d 222 (1st Cir. 1977)."

United States v. *Bynum*, 763 F.2d 474, 476 (1st Cir. 1985). In reviewing findings made after a *Franks* hearing, we apply the clearly erroneous test. *United States* v. *Southard*, 700 F.2d 1, 10 (1st Cir.), *cert. denied*, 464 U.S. 823 (1983).

We have read carefully the wiretap application and the testimony adduced at the *Franks* hearing. We find that the district court properly applied the test required under *Franks* v. *Delaware*, made no clearly erroneous findings of fact and that the facts set forth in the application were more than adequate to support the issuance of the wiretap orders. This ruling makes it unnecessary to discuss the validity of the search warrant issued for defendant's residence since it was challenged only on a "fruits" basis.

IV. THE CROSS-EXAMINATION ISSUE

There is one final issue, whether the district court committed reversible error in refusing to allow defense counsel to question Detective Bradley about the post-indictment renewal of his affair with Adamson. Defendant argues that Bradley had a vested interest in seeing to it that he was convicted and imprisoned. He points to an affidavit of Adamson in which she stated that Bradley had commented to her that they both would be together after defendant was convicted and imprisoned. Bradley, in his affidavit, denied making this comment. Defendant argues that the Adamson affidavit raised substantial questions

about Bradley's credibility and that since the comment was allegedly made during the couple's post-indictment relationship, corss-examinstion about it should have been allowed.

We point out first that the court did allow defense counsel to question Bradley about his post-indictment relationship with Adamson. Tr. 2, 18-19. It was defense counsel's attempts to cross-examine again on this topic that were rebuffed.

"Trial courts are granted broad discretion to control the scope of cross-examination." *United States* v. *Silvestri,* 790 F.2d 186, 190 (1st Cir. 1986) "Only in exceptional circumstances will reversible error be found in the district court's determination of the probative value of testimony in a particular case." *United States* v. *Kepreos,* 759 F.2d 961 (1st Cir.), *cert. denied,* 106 S.Ct. 227 (1985).

Bradley was cross-examined extensively at the hearing on all the facts and nuances of his preindictment affair with Adamson. We fail to see how dredging up more details about the renewal of the sexual liason [*sic*] would have affected Bradley's credibility. It was already clear that he let his emotions override acceptable moral standards. Even if everything Adamson said, both by affidavit and testimony, were accepted and Bradley's statements completely rejected, the result would be the same. The testimony of Adamson and Bradley was to a large extent consistent. The basic question was not credibility, but whether what both admitted had transpired adversely affected defendant's right to due process, assistance of counsel and the wiretap application. For the reasons stated, we find that it did not.

Affirmed.

Appendix B.

United States Court of Appeals

For the First Circuit

No. 86-1183

UNITED STATES,
APPELLEE,

v.

PATRICK COLE,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: December 11, 1986.

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts
, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
FRANCIS P. SCIGLIANO,
Clerk

By:/s/Richard W. Gordon
Chief Deputy Clerk

[cc: Messrs. Wheeler and Merritt]

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiffs,	)	
v.	)	
	)	CRIMINAL NO. 85-376-Y
PATRICK COLE, DEBRA FERRACAMO DAVID CAVICCHIO JOAN ADAMSON, Defendants.	)	

ORDER

(a) The motion of the defendant Cavicchio to dismiss the indictment is denied with prejudice. The motions of the defendants Adamson and Cole to dismiss are likewise denied, but without prejudice to their being renewed post-trial should any demonstrable prejudice appear during the course of further proceedings.

Based on the affidavits and motion papers before it, this Court is prepared to infer that Detective Bradley, during the period following the indictments of Adamson and Cole, intentionally pursued a course of action designed to interfere with those defendants' Sixth Amendment right to counsel and that such conduct is fully binding on the United States. However, since the United States eschews the use of any evidence what-

soever developed post-indictment in the trial of these cases, *see Maine* v. *Moulton*, No. 84-786, slip op. (U.S. December 10, 1985) neither dismissal nor any lesser sanction appears warranted in the absence of demonstrable prejudice. At present, none appears. Should such prejudice appear during the further course of these proceedings the motion to dismiss can be raised again post trial. Likewise, should the Court on the complete trial record conclude that some prophylactic rule ought to be considered in the absence of prejudice, it may grant leave to re-hear these motions.

(b) Considering the totality of the circumstances in this case, Detective Bradley's admitted errors of judgment, and his consequent vulnerability to allegations that he had an ulterior motive to fabricate evidence against the defendant Cole, a pre-trial evidentiary hearing ought be held to determine whether a "false statement knowingly and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit . . ." *Franks* v. *Delaware*, 438 U.S. 154, 155-56 (1978).

(c) Scope and timing of the hearing. The evidentiary hearing will be limited to a consideration of whether, in applying for the wiretap and search warrants in these cases, any information derived through Detective Bradley was knowingly materially false or made with reckless disregard for the truth, and whether such allegedly false averments were necessary to the findings of probable cause.

Should the United States wish to challenge the tentative conclusions set forth in the second paragraph of section (a) above, it may do so through any competent evidence. Should the United States open up this area, the defendants may also introduce evidence thereon.

The hearing of the motions to suppress shall commence on Monday, January 6, 1986 at 9:00 a.m. in Courtroom no.14. Trial will follow immediately thereafter.

/s/_____
William G. Young
United States District Judge

Dated: December 24, 1985

Supreme Court, U.S.
FILED
MAY 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1427

In the Supreme Court of the United States

OCTOBER TERM, 1986

PATRICK COLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
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QUESTIONS PRESENTED

1. Whether a sexual relationship that a law enforcement agent carried on with petitioner's female companion, while investigating petitioner's activities, constituted outrageous government misconduct requiring dismissal of the indictment on due process grounds.

2. Whether the district court should have suppressed evidence that was obtained as a result of court-authorized electronic surveillance, because the government's application for the surveillance order failed to reveal that a law enforcement officer was engaged in a romantic affair with petitioner's female companion and had access to petitioner's residence.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1427

PATRICK COLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 807 F.2d 262. The order of the district court (Pet. App. 15a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on December 11, 1986. The petition for a writ of certiorari was filed on March 3, 1987, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted, on a conditional plea of guilty, of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21

U.S.C. 841(a)(1); and three counts of using a telephone to facilitate a drug conspiracy, in violation of 21 U.S.C. 843. He was sentenced to seven years' imprisonment and a $25,000 fine on the conspiracy count, to a concurrent seven-year term and a six-year special parole term on the possession count, and to concurrent two-year terms on the telephone facilitation counts. The court of appeals affirmed.

1. As summarized in the opinion of the court of appeals (Pet. App. 3a-4a), the pertinent facts are that, in January 1985, Drug Enforcement Administration (DEA) agents, acting in conjunction with the Police Department of Northboro, Massachusetts, began an investigation of petitioner's suspected cocaine-trafficking activities. One of the officers involved in the investigation was Detective Charles Bradley, a member of the Northboro Police Department.

As part of the investigation, Detective Bradley regularly telephoned petitioner's apartment, which petitioner shared with Joan Adamson, his live-in girlfriend. Adamson took messages for petitioner when he was not at home, and, after a period of time, Detective Bradley developed a telephone acquaintance with Adamson. In April 1985, Bradley asked Adamson to meet him in person, both because he enjoyed speaking with her and because he wanted to cultivate her as a possible source of information about petitioner's activities. He informed his superiors and his fellow officers about his plans and advised Adamson of his identity as a detective investigating petitioner. Adamson, however, told Bradley that she was unaware of petitioner's involvement with drugs and would not assist in the investigation.

Early in May 1985, a romantic relationship developed between Bradley and Adamson, and the two engaged in sexual liaisons in petitioner's apartment on 12 to 15 occa-

sions. While in the apartment, Bradley had the opportunity to observe petitioner's sophisticated security systems, consisting of surveillance cameras, television video monitors, and a sequential relay board. On none of the occasions, however, did he observe drugs or drug-related paraphernalia. As the affair continued, Bradley repeatedly questioned Adamson about petitioner's drug-trafficking activities. She insisted that she knew nothing about them and declined to assist in the investigation.

In early August 1985, a DEA agent who was involved in the investigation began preparing an affidavit for electronic surveillance of petitioner's telephone, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Bradley, who then stopped seeing Adamson, did not tell the DEA agent of his affair with her. Consequently, information concerning the affair and Bradley's entries into petitioner's apartment to meet with Adamson was not included in the wiretap application, although the application contained a great deal of other information supplied by Bradley. A surveillance order was issued on September 9, 1985.

On September 24, 1985, on the basis of information derived from electronic interceptions conducted pursuant to the court's order, DEA agents obtained a warrant to search petitioner's apartment. Execution of the warrant resulted in the seizure of cocaine, scales, and other drug-related paraphernalia and led to the eventual arrest and indictment of petitioner, Adamson, and others.[1]

Following Adamson's indictment and petitioner's imprisonment, Adamson and Detective Bradley renewed their affair. During this period, Bradley made disparaging remarks to Adamson concerning the attorneys who were representing petitioner and her (Pet. App. 6a-7a).

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[1] When the government learned of the affair between Adamson and Bradley, it dropped the charges against Adamson (Pet. App. 2a).

2. Before trial, petitioner moved to dismiss the indictment on the ground that Bradley's affair with Adamson constituted such egregious misconduct that it should bar his prosecution and that Bradley, by virtue of his disparaging remarks concerning petitioner's attorney, had interfered with petitioner's Sixth Amendment right to counsel. He also moved to suppress the fruits of the electronic interceptions on the ground that omission from the wiretap application of the fact that Bradley had been inside his apartment on 12 to 15 occasions violated 18 U.S.C. 2518(1)(c) and (3)(c), which require the government to establish, and the court to find, that alternative investigative means, other than electronic surveillance, would not succeed or would be too dangerous.

The district court rejected both of petitioner's arguments that, because of Bradley's activities, the indictment should be dismissed. Addressing the argument that Bradley's conduct with Adamson was so outrageous as to warrant dismissal of the indictment, the court held that, despite its impropriety, Bradley's conduct did not amount to a "coldblooded" effort to exploit Adamson and that no violation of due process occurred (2 H. Tr. 60-61).[2]

As to the argument that Bradley's disparaging remarks interfered with petitioner's right to counsel, the court stated that, based on the affidavits and other papers, it was prepared to infer that, during the postindictment period, Bradley pursued a course of action designed to interfere with the Sixth Amendment rights of petitioner and Adamson. The court concluded, however, that, because the government had avoided the use of any evidence derived from those conversations, petitioner was not prejudiced

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[2] "H. Tr" refers to the transcript of the pretrial hearing in the district court.

by Bradley's conduct, and he therefore was not entitled to dismissal of the indictment or any other form of relief (Pet. App. 16a).[3]

Before ruling on the claim relating to the omissions from the Title III application, the district court conducted a hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978), to determine whether the omission was material and, if so, whether the electronic surveillance order still should have issued. The trial judge, who was also the judge who had issued the surveillance order, found that the information concerning Bradley's liaison with Adamson was "not insubstantial" and was "intentionally omitted" from the warrant application. Nevertheless, the judge concluded that the information about Bradley's relationship with Adamson was not material to the issuance of the order. He reasoned that, because of Adamson's inability or unwillingness to furnish information about the drug conspiracy, he still would have issued the warrant even if the application had contained information concerning the affair (Pet. App. 11a; 2 H. Tr. 59, 61-67).

3. The court of appeals affirmed. Addressing petitioner's due process claim based on allegedly outrageous government conduct, the court held that, although Bradley's conduct in carrying on a sexual affair with Adamson could not be condoned, it was not a due process violation (Pet. App. 6a). Addressing petitioner's claim that Bradley's disparaging remarks to Adamson concerning their counsel interfered with petitioner's right to counsel, the court noted that the attorney had capably represented petitioner throughout the proceedings and that the disparagement did not result in any prejudice to

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[3] The district court recognized, however, that evidence of such prejudice might arise during the course of the trial. The court therefore left it open to the defense to reassert the Sixth Amendment claim at a later point in the proceedings.

petitioner. The court also held that, in the wake of *United States* v. *Morrison*, 449 U.S. 361 (1981), dismissal of the indictment as a prophylactic measure was impermissible even though the violation may have been deliberate (Pet. App. 8a-9a). Finally, with respect to the omission from the wiretap application of any reference to Bradley's activities with Adamson, the court of appeals held that the district court's finding that the omission did not involve material facts was not "clearly erroneous" and therefore should be sustained on appeal (*id.* at 11a-12a).

ARGUMENT

1. Relying on *United States* v. *Russell*, 411 U.S. 423 (1973), petitioner contends (Pet. 4-6) that Detective Bradley's conduct in carrying on a sexual relationship with Adamson while investigating the activities of her boyfriend was so egregiously improper that it should bar his prosecution. Petitioner does not claim that there is a conflict in the circuits on this issue, and in fact several courts of appeals have rejected similar (or more substantial) claims.

In *Russell*, this Court rejected the claim that an undercover agent entrapped the defendant as a matter of law by furnishing an essential ingredient for the manufacture of a controlled substance. The Court acknowledged, however, that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" (411 U.S. at 431-432). In *Hampton* v. *United States*, 425 U.S. 484 (1976), a majority of the Court subsequently agreed that, in certain circumstances, the government's actions in conducting an investigation may be so outrageous as to violate due process. See 425 U.S. at 491-495 (Powell & Blackmun, JJ., concurring); *id.* at 496 (Brennan, Stewart & Marshall, JJ., dissenting). In

his concurring opinion, however, Justice Powell pointed out that the issue in *Russell* was whether police overinvolvement in a crime was so outrageous that it violated considerations of due process and that, when the defendant is predisposed to commit the offense, instances where such action would bar a conviction would be rare (*id.* at 492-495 & n.7).

In the wake of *Hampton*, the courts of appeals that have addressed the defense of outrageous government conduct have emphasized that " 'the due process channel which *Russell* kept open is a most narrow one' " and that "[t]he outrageous government conduct defense is available only where 'the government is so involved in the criminal endeavor that it shocks [the] sense of justice.' " *United States* v. *Stenberg*, 803 F.2d 422, 429 (9th Cir. 1986) (citations omitted); see, *e.g.*, *United States* v. *Nations*, 764 F.2d 1073, 1077 (5th Cir. 1985) (emphasis in original) ("the outrageous government conduct defense is available only upon proof of government *overinvolvement* in the charged crime"); *United States* v. *Tobias*, 662 F.2d 381, 386 (5th Cir. 1981) (same), cert. denied, 457 U.S. 1108 (1982); see also *United States* v. *Kelly*, 707 F.2d 1460, 1468 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983); *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). In this case there is no evidence that Detective Bradley's liaison with Adamson resulted in any involvement whatsoever by government agents in petitioner's ongoing cocaine operation. Under the reasoning of these authorities, the defense is therefore simply unavailable.

Although in *Rochin* v. *California*, 342 U.S. 165, 172 (1952), the Court held that evidence may be supressed on due process grounds when the manner in which the government obtains the evidence offends the decencies of a civilized society, the application of that principle has properly been limited to instances in which the government's

conduct directly invades some personal right of the defendant. See *United States* v. *Kelly*, 707 F.2d at 1468 n.49; *United States* v. *Alexandro*, 675 F.2d 34, 40-41 (2d Cir.), cert. denied, 459 U.S. 835 (1982); see also *United States* v. *Simpson*, No. 84-5301 (9th Cir. Apr. 3, 1987), slip op. 9 ("outrageous conduct" defense limited to cases of "brutality and coercion"). In this case, Bradley's relationship with Adamson not only failed to infringe petitioner's personal integrity so as to deprive him of due process of law, but, as the court below reasoned, it was not of such a nature as to offend contemporary standards of decency. Accord *Simpson*, slip op. 9-10 (even "the deceptive creation and/or exploitation of an intimate relationship" with the suspect himself—something considerably more troublesome than the nondeceptive relationship at issue here—"does not exceed the boundary of permissible law enforcement tactics").

As the district court found, Bradley initiated his relationship with Adamson for the purpose of gathering evidence against petitioner, but the continuation of the affair was not a calculated effort to develop information. Rather, the affair developed into a mutual romance so that "it [was] not at all clear * * * who was seducing whom" (2 H. Tr. 56-57, 60). Indeed, Bradley pursued the affair long after it became apparent to him that Adamson would not be a fruitful source of information and in complete disregard of its potential adverse impact on the ongoing investigation.[4] In these circumstances, the courts

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[4] Petitioner argues (Pet. 6) that reversal of his conviction is warranted as a prophylactic measure to discourage the recurrence of such behavior in future cases. As the Court has repeatedly emphasized, however, in the absence of prejudice to the defendant, the appropriate means of deterring misconduct by law enforcement officers is to initiate disciplinary proceedings against them. See *United States* v. *Hasting*, 461 U.S. 499, 506 & n.4 (1983); *United States* v. *Payner*, 447 U.S. 727, 733-734 & n.5 (1980); *Hampton* v. *United States*, 425 U.S.

below properly concluded that, despite the impropriety of the relationship, no due process violation occurred. Cf. *United States* v. *Prairie*, 572 F.2d 1316, 1319 (9th Cir. 1978) (use of prostitute by government to ensnare drug dealer not violative of due process); *United States* v. *Simpson, supra* (same).[5]

2. Petitioner also claims (Pet. 6-7) that the government's application for an electronic surveillance order was fatally deficient because it failed to disclose to the district judge who issued the order that, because of his relationship with Adamson, Bradley had access to petitioner's residence. More specifically, petitioner maintains that that information, if available to the issuing judge, would have demonstrated that alternative means of investigation were available to law enforcement authorities. This claim was also properly rejected by the courts below.

The statute that provides procedures for the interception of wire or oral communications requires that a wiretap application include, among other things, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" (18 U.S.C. 2518(1)(c)). It also pro-

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at 490 (plurality opinion); see also *United States* v. *Morrison*, 449 U.S. 361, 365 (1981).

[5] Nor is petitioner entitled to relief as the result of Bradley's disparaging remarks to Adamson concerning the attorneys representing Adamson and petitioner. See Pet. 5. As the Court explained in *United States* v. *Morrison*, 449 U.S. at 365 (footnote omitted), in rejecting an identical claim, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation [of the defendant's right to counsel] may have been deliberate." In this case, the government introduced no evidence derived from Bradley's postindictment conversations with Adamson, and petitioner failed to point to any prejudice that he suffered as a result of Bradley's remarks (Pet. App. 9a, 15a). There was therefore no basis for relief.

vides that a judge may issue an ex parte order for a wiretap if he determines on the basis of the facts submitted that, among other things, "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous" (18 U.S.C. 2518(3)(c)). When the wiretap application fails to discuss certain alternative available means of conducting an investigation, the touchstone for determining whether wiretap evidence should be suppressed is whether the omissions were material to the issuance of the order, *i.e.*, whether, if the omitted information had been included in the wiretap application, the order still would have issued. See *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978); *United States* v. *Ippolito*, 774 F.2d 1482, 1484-1486 (9th Cir. 1985); *United States* v. *Brooklier*, 685 F.2d 1208, 1221 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).

In this case, the trial judge determined that, even if he had been apprised of Bradley's access to petitioner's residence as a result of his affair with Adamson, he still would have issued the interception order. He would have done so, the judge explained, because Adamson either lacked the information necessary to reveal the operation of the conspiracy or demonstrated her unwillingness to share information concerning the scheme with law enforcement authorities (Pet. App. 10a-11a). Consequently, even if Bradley's relationship with Adamson constituted the type of alternative investigative procedure contemplated by Section 2518(1)(c), the failure to refer to its availability in this case was not a material omission from the surveillance application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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